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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAKE EDGAR TREW,

Defendant and Appellant.

C090889

(Super. Ct. No. 18FE009503)

After defendant Jake Edgar Trew committed a residential burglary, the California Legislature enacted Penal Code section 1001.36,¹ permitting mental health diversion for criminal defendants suffering from certain mental disorders. After the law's effective date, defendant pleaded no contest to the burglary. Before he was sentenced, however, defendant filed a motion seeking diversion. The trial court denied the motion. On appeal, defendant argues the trial court abused its discretion by denying the motion not on the law, but on the basis of its personal policy preferences. The People argue

¹ Undesignated statutory references are to the Penal Code.

defendant's motion was untimely, and was properly denied on the merits. We conclude the People forfeited the argument that the motion was untimely. On the merits, we agree with defendant and remand the matter for further proceedings.

BACKGROUND

On May 9, 2018, defendant committed a residential burglary while the resident was home. The victim was working in his home office when he heard someone ring his doorbell. When the victim opened the front door, no one was there. As the victim was walking back to his office, he looked through his kitchen window and saw defendant in his backyard. Moments later, the victim heard someone open the rear security door and attempt to turn the locked kitchen doorknob. The victim ran outside, confronted defendant, and demanded to know what he was doing. Defendant claimed to be looking for his dog and quickly fled in a truck. Defendant was arrested two days later.

On June 6, 2018, an amended felony complaint was filed, charging defendant with first degree residential burglary (§ 459), and alleging four prior strikes, all first degree burglary convictions from 2011.

On June 27, 2018, the statute at issue here (§ 1001.36) became effective, creating a pretrial diversion program for defendants who suffer from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (hereafter, "DSM"). (Stats. 2018, ch. 34, § 24.)

On July 23, 2019, pursuant to an agreement with the People, and with the trial court's involvement, defendant pleaded no contest to one count of first degree burglary (§ 459) and admitted that someone other than an accomplice was in the residence during the burglary (§ 667.5, subd. (c)(21)), and that he suffered one prior strike (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)) and one prior serious felony conviction (§ 667, subd. (a)). In exchange, the People agreed to a 17-year sentence, arrived at, in part, by dismissing three of defendant's four prior strike convictions.

On October 15, 2019, defendant filed a formal motion for pretrial mental health diversion, based upon his severe opioid use disorder.

In support, defendant provided a “diagnostic interview” memorandum prepared by Dr. Rachel Couzens, a licensed clinical psychologist, which concluded that defendant met the “DSM-V criteria for Opioid Use Disorder, Severe.” Based upon her review of records and her interview with defendant, Dr. Couzens explained that defendant was drinking alcohol and smoking marijuana “on a daily basis by the time he was twelve or thirteen,” and was regularly using heroin by his senior year of high school. She opined that defendant “engaged in criminal behavior in order to fund his drug habit because he could not hold a job and he had a compulsion to continue using opiates.”

The record indicates that at an October 18, 2019 hearing, the trial court inquired whether defendant’s diversion motion was timely.

On October 22, 2019, the People filed an opposition to defendant’s motion, arguing—on the merits—that defendant did not qualify for diversion. The opposition did not address whether the motion was timely, despite the court’s invitation.

On November 1, 2019, the trial court denied defendant’s motion. Recalling that at a previous hearing it “had asked the lawyers whether” defendant’s motion “was timely,” the trial court expressed doubt that it was timely, but addressed the merits because, even before the plea was taken, defense counsel “did raise . . . right from the very beginning, . . . this mental health diversion possibility,” “even though [counsel] did not specifically call it” that at the change of plea hearing. The trial court reiterated: “[I]t was raised by [defense counsel] right off the bat, and I think in fairness, I should treat it almost like we are at the beginning stages.”

Before critiquing what in the trial court’s view is an undue expansion of the number of recognized mental health disorders in the latest version of the DSM, the trial court noted that “by virtue of what the doctor” who examined defendant said, “[o]ne

would think . . . that the requirements of granting diversion have been met.”² And, for that reason, the trial court “was exploring the possibility” of “appoint[ing] [its] own doctor [to] see whether or not some other doctor . . . agree[d]” with defendant’s expert.

“But ultimately,” the trial court concluded appointment of its own expert was unnecessary “for a number of reasons,” including: (1) it “question[ed] . . . whether or not the defendant’s . . . opioid addiction, ha[d] a valid scientific basis,” (2) even assuming defendant *did* have a “recognized disorder,” the trial court was not satisfied the disorder was “a central, significant factor in why” defendant committed the burglary, and (3) given the number of residential burglaries defendant committed, and his “dismal” “performance on parole,” defendant “represent[ed] a greater threat to society than the average criminal,” and “the interest of justice” would not be served by granting mental health diversion.

The science

First, while acknowledging that opioid addiction “is now a recognized mental disorder under the DSM-V” (the most recent version of the DSM), the trial court explained that “the DSM-V has come in for some very sharp criticisms from . . . judges, lawyers, prosecutors, around the country . . . as scientifically unsound.” “[P]eople have been attacking the DSM-V by making the point that it is a document . . . that seems to further this rather questionable tendency of the psychiatric profession . . . to classify what we would normally understand to be irresponsible, . . . even illegal behavior as psychological disorders.”

The trial court continued: “[M]ore and more crimes . . . are deemed to be diseases to be cured rather than antisocial behavior that needs to be punished.” “[W]e are . . . leaving sentencing decisions in the hands of doctors . . .” “If [p]eople are not held

² In fact, the trial court said shortly thereafter: “Admittedly, the *prima facie* case has been met.”

responsible for their behavior and actions, then I question why we're here. I mean, why not just send everybody to therapy upon being arrested and charged[?]"

Opioid addiction's role in defendant's crime

"[E]ven assuming . . . that [defendant] does have some recognized disorder," the trial court explained, "the question then is [whether] the disorder played a significant role in the . . . commission of" the burglary. "The doctor said [it] did. But . . . that's my call, not the doctor's call," the trial court maintained.

Recognizing that defendant's opioid addiction "could be one factor," the trial court nevertheless concluded that it "would need a lot more exploration in terms of [defendant's] entire mental outlook" to be able to conclude that opioid addiction "played a significant role" in defendant's commission of the burglary. The trial court explained: "[I]t influenced him in some way what he did. But I don't think it is, at least to my satisfaction, it has not been proven that it is a *central*, significant factor in why he did what he did." (Italics added.) The trial court continued, "[B]ottom line is I reject the idea that [defendant's] emotional challenges are such as to justify him getting any . . . leniency . . . in this case."

Interest of justice

The trial court stated, "I have to be convinced that the interest of justice would justify granting [defendant] mental health diversion. For all these reasons, I don't think it's justified in this case and I'm denying it."

The trial court's reasons appear to have been (1) the incongruity between the pretrial diversion law and California's three strikes law, and (2) that, "given how many times" he committed residential burglary, and his "dismal" and "terrible" performance on parole since 2015, defendant represented "a greater threat to society than the average criminal"

Regarding the first reason, the trial court saw the following "incongru[ity]" in California's sentencing regime: if the trial court "had been asked simply to" decide

whether to strike a prior strike offense of someone like defendant (“a young man here charged with a . . . residential burglary,” who has “multiple convictions” from “basically one case from 2010”), the trial court’s “answer would have been no.” But the “reasons that [the trial court] would have used . . . to deny such a request,” *now* under the new pretrial diversion law, seem to support “grant[ing] somebody ability to have this case dismissed by referring [defendant] to mental health diversion.”

Sentence

After denying defendant’s motion for pretrial diversion, and consistent with the plea agreement, the trial court sentenced defendant to 17 years in prison, consisting of six years for the burglary, doubled to 12 years for the prior strike, plus five years for the prior serious felony conviction.

Defendant timely appealed.

DISCUSSION

Defendant contends the trial court abused its discretion by denying the request for mental health diversion because of its “own policy preferences versus those established by the California Legislature.”

The People argue defendant is “ineligible for relief,” because his diversion request “was untimely,” having been filed after defendant pleaded no contest. On the merits, the People argue the trial court did not abuse its discretion, because “its conclusion that [defendant] would pose an unreasonable risk of danger to public safety if released for treatment in the community [was] fully supported by the record and not in dispute.”

Defendant responds that the People forfeited on appeal the question of the timeliness of his request for pretrial diversion because they “did not object to the trial court’s ruling to hear [defendant’s] motion on its merits,” and the trial court never actually concluded that defendant would pose an unreasonable risk of danger to public safety if released for treatment in the community.

On the question of timeliness, we conclude the People forfeited the issue on appeal by failing to raise it in the trial court. On the merits, we conclude the trial court abused its discretion by questioning legislative policy decisions and departing from the text of section 1001.36. We further conclude that contrary to the People’s contention, the record does not reflect that the trial court found that defendant would pose an “unreasonable risk of danger to public safety” within the meaning of the pretrial diversion law.

I

Legal Background

“Section 1001.36 authorizes a pretrial diversion program for defendants with qualifying mental disorders. The statute defines ‘ “pretrial diversion” ’ as ‘the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment’ (§ 1001.36, subd. (c).)

The stated purpose of the diversion statute ‘is to promote all of the following: [¶] (a) Increased diversion of individuals with mental disorders to mitigate the individuals’ entry and reentry into the criminal justice system while protecting public safety. [¶] (b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings. [¶] (c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders.’ (§ 1001.35, subds. (a)-(c).)

“As originally enacted, section 1001.36 provided that a trial court may grant pretrial diversion if it finds all of the following: (1) the defendant suffers from a qualifying mental disorder;^[3] (2) the disorder played a significant role in the commission of the charged offense; (3) the defendant’s symptoms will respond to mental health

³ Section 1001.36, subdivision (b)(1)(A) provides that a defendant must suffer from “a mental disorder as identified in the most recent edition of the [DSM].”

treatment; (4) the defendant consents to diversion and waives his or her speedy trial right; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (Former § 1001.36, subd. (b)(1)–(6).) Section 1001.36 was subsequently amended by Senate Bill No. 215 (2017-2018 Reg. Sess.) . . . to specify that defendants charged with certain crimes, such as murder and rape, are ineligible for diversion. (§ 1001.36, subd. (b)(2), as amended by Stats. 2018, ch. 1005, § 1.)

“If the defendant makes a prima facie showing that he or she meets all of the threshold eligibility requirements and the defendant and the offense are suitable for diversion, and the trial court is satisfied that the recommended program of mental health treatment will meet the specialized mental health treatment needs of the defendant, then the court may grant pretrial diversion. (§ 1001.36, subds. (a), (b)(3) & (c)(1).)” (*People v. Frahs* (2020) 9 Cal.5th 618, 626-627 (*Frahs*).)

II

The People Forfeited the Issue of Timeliness

The People argue that defendant’s motion for pretrial diversion was untimely, because it was not made “at any point . . . until adjudication” (§ 1001.36, subd. (c)), but *after* adjudication, i.e., defendant’s no contest plea. We agree with defendant that the People have forfeited this argument on appeal.

The forfeiture doctrine may bar the People from raising an argument on appeal that they failed to raise in the trial court. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303; see *People v. Gerold* (2009) 174 Cal.App.4th 781, 786 [“the People forfeited the applicability of the statute of limitations by failing to raise it at the hearing on the matter”].)

Here, the record indicates the trial court, on its own, asked both parties whether defendant’s motion was timely; nevertheless, the prosecution declined to address the issue of timeliness in its opposition brief. In any event, the trial court raised the issue

before it ruled on the merits. The record contains no indication the People ever objected to the timeliness of defendant's motion; not in their opposition to defendant's motion and not at the hearing on the motion. Under these circumstances, we conclude the People have forfeited on appeal the argument that defendant's motion was untimely.⁴

III

Abuse of Discretion

When construing a statute, the role of the courts "is to discern the Legislature's intent, not to substitute our judgment based on . . . inconsistencies," particularly when "the language" of the statute "is plain." (*Marina Pacifica Homeowners Assn. v. Southern California Financial Corp.* (2017) 11 Cal.App.5th 54, 66.) "It is not our role to question . . . statutes or the public policies underlying them." (*Martin v. PacifiCare of California* (2011) 198 Cal.App.4th 1390, 1407.)

"Abuse of discretion has at least two components: a factual component . . . and a legal component. [Citation.] This legal component of discretion was best explained long ago in *Bailey v. Taaffe* (1866) 29 Cal. 422, 424: 'The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' " (*Concord Communities, L.P. v. City of Concord* (2001) 91 Cal.App.4th 1407, 1417)

⁴ Even if the People *had* objected in the trial court to the timeliness of defendant's motion, the trial court's statements at the November 2019 hearing indicating that, as a practical matter, defendant *did* raise the issue of pretrial diversion before his plea, suggest that principles of equity might preclude a conclusion by us that defendant's motion was untimely. (Cf. *Padres Hacia Una Vida Mejor v. Davis* (2002) 96 Cal.App.4th 1123, 1135 [because opposing parties "were aware that [a party] had not given up its fight against the" opposing parties' conduct, "principles of equity [did] not bar [the complaining party] from pursuing" the sought-after relief].)

“ ‘Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an “abuse” of discretion. [Citation.]’ [Citations.]” (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 239.)

Applying these concepts here leads us to conclude that the court abused its discretion in ruling on defendant’s motion for pretrial diversion because it misapplied the legal standards when evaluating defendant’s suitability under section 1001.36. After stating that “the prima facie case [for diversion] has been met” based upon the psychologist’s evaluation of defendant, the trial court went on to (1) question the criminal justice policies underlying section 1001.36, (2) discuss the “rather questionable tendency of the psychiatric profession . . . to classify what we would normally understand to be irresponsible, may be unethical, may be even illegal behavior as psychological disorders,” and (3) second-guess the validity of the science underlying the DSM. The trial court thereby substituted its judgment for the Legislature’s and transgressed the confines of applicable legal principles.

The People argue that we should affirm the trial court’s ruling because the trial court’s “conclusion that [defendant] would pose an unreasonable risk of danger to public safety if released for treatment in the community [was] fully supported by the record.” The People appear to be making a “harmless error” argument without explicitly saying so. In any event, this argument is unpersuasive, as the trial court did not find that defendant would “pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community.”⁵ (§ 1001.36, subd. (b)(1)(F).) Rather, the

⁵ The People do not argue we should affirm the trial court’s ruling because the trial court concluded defendant’s opioid addiction was not a significant factor in the commission of the burglary. (See § 1001.36, subd. (b)(1)(B) [if a defendant’s “mental disorder *substantially contributed* to the defendant’s involvement in the commission of the offense,” a court may conclude it was a “significant factor” in the commission of the offense], italics added.)

trial court “found” that the *interest of justice* did not “justify” granting pretrial diversion, after declaring that it “had to be convinced” of the justification. These are different tests, and contrary to the People’s contention, the record does not reflect a finding that can be tethered to section 1001.36, subdivision (b)(1)(F). Indeed, the trial court’s “interest of justice” requirement appears to have imposed on defendant an extrastatutory burden of persuasion not contemplated by the Legislature.

The People’s effort to shoehorn the trial court’s observations regarding defendant’s criminal history into section 1001.36, subdivision (b)(1)(F) also is unpersuasive, in part because the provision does not contemplate an amorphous, general danger to the public, but a narrower “danger to the public, *as defined in [s]ection 1170.18.*” (Italics added.) And “[s]ection 1170.18 defines ‘unreasonable risk of danger to public safety’ as the likelihood a defendant will commit a new violent felony within the meaning of section 667, subdivision (e)(2)(C)(iv). ‘Section 667, subdivision (e)(2)(C)(iv) enumerates a narrow list of super-strike offenses such as murder, rape and child molestation.’ [Citation.] [Defendant’s] prior burglary convictions are not super-strike offenses.” (*People v. Burns* (2019) 38 Cal.App.5th 776, 789.)

For all these reasons, we conclude the trial court abused its discretion in denying defendant’s motion for pretrial mental health diversion.

IV

Relief

The relief defendant seeks is reversal and “remand[] for further proceedings consistent with the policy decisions made by the Legislature and implemented by the enactment of . . . section 1001.36.”

In accordance with the procedure outlined in *Frahs, supra*, 9 Cal.5th at pages 640 through 641, we conclude that conditional reversal is warranted with the following guidance in considering defendant’s eligibility for diversion under section 1001.36 on remand: If the trial court finds that defendant meets the six statutory criteria, then the

court may grant diversion. If defendant successfully completes diversion, then the court shall dismiss the charges. But, if the trial court determines that defendant does not meet the criteria under section 1001.36, or if defendant does not successfully complete diversion, then his convictions and sentence shall be reinstated. Though we “express no view concerning whether defendant will be able to show eligibility on remand or whether the trial court should exercise its discretion to grant diversion if it finds him eligible” (*Frahs*, at p. 641), we emphasize that the trial court must adhere to the letter and spirit of the mental health diversion statute, not disagree with it.

DISPOSITION

The judgment is conditionally reversed. The matter is remanded for further proceedings consistent with this opinion.

KRAUSE, J.

We concur:

RAYE, P. J.

BLEASE, J.